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IN THE

Supreme Court of the United States

OCTOBER TERM, 1962

No. 890

EDWARD JOHN WILLIAMS and EVELYN WALKER,
Petitioners,
vs.
THE PEOPLE OF THE STATE OF MICHIGAN,
Respondent

PETITION FOR WRIT OF CERTIORARI TO THE MICHIGAN SUPREME COURT

GOLDFARB and HUDNUT,
Attorneys for Petitioners,
2001 Cadillac Tower,
Detroit 26, Michigan.

Interstate Brief & Record Co., 356 Congress St. E., Detroit 26, Michigan

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Petitioners pray that a writ of certiorari issue to review the judgment of the Michigan Supreme Court entered in the above-entitled cause on December 4, 1962.

OPINION BELOW

The opinion of the Michigan Supreme Court is reported in — Mich. —, 118 N.W. 2nd 391: a copy of the opinion is printed in Appendix B, *infra* pages 15-24.

JURISDICTION

The Judgment of the Michigan Supreme Court was entered on December 4, 1962. Jurisdiction of this Court is invoked pursuant to 28 U.S.C., 1257 (3) which permits this court to review cases from a State court in which there is a substantial Federal question.

STATUTES INVOLVED

The statutory provisions involved are Michigan Comp. Laws 1948, Sec. 750.360, which is set forth in Appendix A.

QUESTIONS INVOLVED

1. Does the Michigan rule which restricts consideration of the legality of a search and seizure to the preliminary examination testimony deny the defendant due process of law?

2. Is a search of an automobile four (4) hours after the arrest of the Defendants without a warrant in violation of the 14th Amendment to the United States Constitution?

STATEMENT OF FACTS

On September 16, 1960, Petitioners Edward John Williams and Evelyn Walker were arraigned on a warrant charging breaking and entering a building during the night with intent to commit larceny. Following a preliminary examination on October 5, 1960, they were bound over

for trial on that count and on an added count of Larceny from a building.

The arresting officers were called to the premises by a radio run summoning them to investigate someone throwing boxes on a lawn (Petitioners' appendix 14a, 21a). Upon their arrival they were met by a citizen, Chester Pilat, who said that he was driving into a driveway when he saw a man run between the houses, and he requested one of the officers to accompany him into his home to see if it had been burglarized (Petitioners' Appendix 25a, 29a). The testimony is conflicting as to whether he said anything else. One officer, William Hayes, claimed Pilat told him he saw a man rolling a wrapped tire toward the car and putting it underneath the trunk (Petitioners' Appendix, 15a, 22a). However, he made no mention of this conversation in his arrest report (Petitioners Appendix, 23a). The alleged informant, Chester Pilat, emphatically denies making any statement regarding a tire (Petitioners' Appendix, 26a, 27a and 28a), and gave defense counsel a sworn affidavit to that effect before the trial (Petitioners' Appendix, 8a, 9a). Morris Kunka, another officer present at the arrest states that Chester Pilat approached him first, that he accompanied Pilat into the house and as they came out he told Hayes, who was by the car, to check that car because it was strange to the neighborhood (Petitioners' Appendix, 24a, 25a).

He further asserted that Pilat did not make any statements regarding a tire before the defendants were removed from the car (Petitioners' Appendix, 25a). Donald Black, another officer stated that he heard someone mention a tire, but that was all he knew about it (Petitioners' Appendix, 29a).

The fourth officer Clavio Gallerani also stated that he saw Patrolman Kunka go with Pilat into the house and also heard him tell Hayes to check the car when he returned, but he never heard Chester Pilat mention a tire (Petitioners' Appendix, 30a).

At the time the officers arrested the Petitioners, who were in the car, they searched them and the car. They asked for a key to the trunk, were informed that there hadn't been a key for several months, and they searched the premises and the car thoroughly in an attempt to find one (Petitioners' Appendix, 17a, 18a). They did not know at that time that a crime had been committed, but they took the petitioners and the car to the station, booked the petitioners on suspicion, and placed the car in the pound (Petitioner's Appendix, 18a, 29a). Several hours later a larceny in a gas station was reported and that time, without a warrant, the trunk of the petitioners' car was searched and the tires were found (Petitioners' Appendix, 18a, 24a, 29a).

Based on the above facts, the Petitioners moved to suppress the evidence because it was illegally seized and to quash the information (Petitioners' Appendix, 3a, through 8a). The Honorable Gerald Groat, Judge of the Recorders Court for the City of Detroit, refused to consider Pilat's Affidavit which was appended to the motion (Petitioners' Appendix, 11a) and he denied the motion (Petitioner's Appendix, 12a).

The Petitioners were tried before the Honorable George Murphy, Judge of the Recorder's Court of the City of Detroit, sitting without a jury, on January 11, 1961. On January 17, 1961, they were found guilty of the second count (Petitioners' Appendix, 1a). Petitioners' motion for a new trial was denied (Petitioner's Appendix, 2a) and

upon rehearing it was again denied (Petitioners' Appendix, 2a). Petitioners appealed to the Michigan Supreme Court for leave and the Judgment was affirmed on December 4, 1962.

REASONS FOR GRANTING WRIT

1. Prior to trial the Petitioners moved to suppress the evidence which was found when the arresting officers tore out the back seat of the car, on the ground that such evidence was found as the result of an illegal search and seizure and should be suppressed. The Trial Judge denied the motion on the grounds that the evidence was seized as an incident to a lawful arrest. The Petitioners appealed the case to the Michigan Supreme Court setting forth as one of the grounds for said appeal, the denial of the motion to suppress the evidence at the trial. The Michigan Supreme Court affirmed the trial court's decision supporting the affirmance by a series of Michigan cases which had held that only the evidence adduced at the preliminary hearing could be considered when ruling on the legality of a search.

It is the Petitioners' contention that the Michigan procedural rule restricting consideration of the legality of a search to the preliminary examination proofs denies the Petitioners the protection of the Fourth Amendment which applies to the states through the Fourteenth Amendment by virtue of this Court's decision in *Mapp v. Ohio*, 367 U.S. 643 (1961).

The legality of a search depends on all the facts incident to that search and not merely on the facts which are proven at the preliminary examination. The purpose of

a preliminary examination in Michigan is to determine if there is sufficient evidence to bind an accused over for trial. Defense counsel at that time does not necessarily, or even usually, know the nature of the prosecution's case. He does not know the nature of the witnesses' testimony nor what type of investigation this testimony will indicate is necessary. At the time of the preliminary examination, the nature of the evidence supporting the prosecution is exclusively within the knowledge of the prosecutor. Because the constitutional guarantee against illegal search and seizure is of such magnitude and so "inherent in the concept of ordered liberty" at any time the evidence indicates that an arrest was made without a warrant only on general suspicion and especially without any knowledge of the commission of a specific crime as in the instant case, the fruits of that illegal arrest and search should be immediately suppressed, regardless of the stage of the proceedings.

This rule has been recognized by this Court in *Giordenello v. United States*, 357 U.S. 480 (1957), wherein the Court said that waiver of the preliminary examination provided for in Rule 5 of the Federal Rules of Criminal procedure did not waive the right to contest the legality of the search. The Court said (at pages 483, 484):

> "A crime of this nature may involve legal issues of subtlety and complexity it would be unfair to require a defendant to present so soon after arrest, and in many instances, as here, before a final selection of counsel.
>
> "In addition, examination of the purpose of the preliminary examination before a Commissioner makes evident the unsoundness of the Government's position. • • •

> "By waiving preliminary examination a defendant waives no more than the right which the examination was intended to secure him—the right not to be held in the absence of a finding by the Commissioner of probable cause that he has committed an offense."
>
> *"By the same token, the Commissioner here had no authority to adjudicate the admissibility at petitioner's later trial of the heroin taken from his person."* (Emphasis added.)

This case clearly indicates that the defendant must have a right to question the legality of an arrest and search at any time and that his rights cannot be finally adjudicated at a preliminary stage of the proceedings. Furthermore, numerous Supreme Court decisions have indicated that the legality of a search and seizure must be considered in light of the trial testimony. In *Rios v. United States*, 364 U.S. 253 (1960) at page 260 the Supreme Court discussed in detail the necessity for considering the legality of a search in light of all the testimony and not merely that of the preliminary proofs. In the *Rios* case the facts were very similar to the facts in the instant case. The question which would determine the legality of the search was the moment at which the arrest occurred. In that case, a taxi cab was stopped by the police officers and the defendant was seen dropping a readily recognizable package of narcotics. The preliminary proofs indicated that the arrest was made after the officers saw the defendant drop the narcotics. Based upon this testimony, a preliminary motion to suppress the evidence was denied because the arrest was made after a felony was committed in the presence of the arresting officers. However, the taxi cab driver testified at the trial that the arrest was made immediately after he stopped and the narcotics were found after the defendant was al-

ready in custody. The trial judge denied a motion to suppress at that time, holding himself to be bound by the preliminary testimony and the prior ruling on a similar motion. The Supreme Court reversed, stating that the ruling on the motion must take into consideration the testimony of the taxi cab driver.

In *Gouled v. United States*, 255 U.S. 298 (1921) the Supreme Court spoke directly to the point which is now at issue, when they said:

> "In the case we are considering, the certificate shows that a motion to return the papers seized under the search warrant was made before the trial and was denied, and that on the trial of the case, before another Judge, this ruling was treated as conclusive although, as we have seen, in the progress of the trial, it must have become apparent that the papers had been unconstitutionally seized. The constitutional objection having been renewed, under the circumstances, the court should have inquired as to the origin of the papers when they were offered in evidence against the defendant."

The Court also said in the same case:

> "(W)here in the progress of a trial it becomes possible that there has been an unconstitutional seizure of these papers, it is the duty of the trial court to entertain an objection to their admission, or a motion for their exclusion, and to consider and decide the question *as then presented* even where a motion to return the papers may have been denied before trial. A rule of practice must not be allowed for any technical reason to prevail over a constitutional right." (Emphasis added.)

See also *Waldron v. United States*, 219 Fed. 2nd 37 (D.C. Cir. 1955); *Cohen v. United States*, 278 U.S. 221 (1929); and *DiBella v. United States*, 369 U.S. 121 (1962).

The subsequent events in the instant case indicate the danger of restricting the consideration of the merits of a claim of illegal seizure to the evidence at the preliminary hearing. One of the key questions in this case was the legality of the arrest, and the determination of this question rested solely upon the knowledge that the arresting officer had at the time he arrested the defendants. At the preliminary hearing the arresting officer, officer Hayes, testified that the actions of the officers which culminated in the arrest of the Petitioners were predicated upon information received from Chester Pilat, a resident in that area. Yet, Pilat testified at the trial that he did not see anyone running with a tire, nor did he say anything at all to the officers about a tire; all he said was that he saw a man running through the alley and that he was afraid his home had been burglarized.

Furthermore, the testimony of the other three officers present at the arrest indicates that the sequence of events was such that it would have been impossible for officer Hayes to have talked to Pilat preceding the arrest of the Petitioners. The testimony of officers Black, Gallerani, and Kunka indicates that the two scout cars arrived at the scene almost simultaneously. Black noticed the boxes on the lawn and he and his partner Hayes went to investigate. At that time, the door of a car parked in the driveway opened and Pilat walked out and approached officer Kunka, who was and had been a friend of his for years. He asked what was going on and then told Kunka that he had seen a man running through the alley and thought that his house may have been burglarized. Kunka accompanied Pilat to the house and looked for signs indicating a burglary. Upon being satisfied that the house had not been touched, they went outside again. Pilat then told Kunka that one of the

cars parked down the street was a strange car to the neighborhood. At that time Kunka yelled to Hayes who was busy with the boxes, to check the car. Hayes shone the flashlight into the car and the petitioners sat up. Without further interrogation, Hayes told the petitioners to get out of the car, put their hands on the roof, and searched them and seized certain articles such as gloves, pliers, etc.

After the search and seizure, the officers then proceeded to interrogate the petitioners, took them in and booked them and held them until a crime had been reported and then tore out the back seat of the car and obtained the tires. The testimony of all the officers and Chester Pilat substantiates this outline of the sequence of events preceding and following the arrest of the petitioners. The only officer whose testimony differs in any material respect is Hayes, the only officer called at the preliminary examination. The credibility of his testimony is colored by his subsequent testimony at the trial. It was brought out that no mention of any conversation with Pilat was contained in the original report, and yet this purported conversation allegedly was what made him believe a crime may have been committed and formed the basis for his arrest. The discrediting character of the substantial omission such as this was recognized by this Court in *Jencks v. United States*, 353 U.S. 657 (1957) when it said:

> "Flat contradiction between the witnesses' testimony and the version of events given in his reports is not the only test of inconsistency. *The omission from the report of facts related at the trial*, or a contract (sic) in emphasis upon the same facts or even a different order of treatment are also relevant to the cross-examining process of testing the credibility of the witnesses' trial testimony." (Emphasis added.)

Furthermore, Hayes stated first that the conversation about the tires was held in the presence of the petitioners, and a few questions later said that it was the conversation about the tires that led him to discover and arrest the petitioners. When the inconsistency between these two answers was pointed out, he then stated that there were two conversations, one in the presence of the petitioners and one without their presence in which the said statements were made. To hold that the testimony taken at the preliminary examination is the only evidence which can be considered to determine the merits of the assertion of the petitioners' Constitutional rights would be highly unfair. This is especially so when the subsequent testimony in the trial completely contradicts the testimony at the preliminary examination.

It is very significant in this regard that neither Chester Pilat, whose statements allegedly gave rise to the arrest, nor any of the other arresting officers were called to testify at the preliminary examination. Certainly the declarant who saw the defendant rolling the tire would be better qualified to testify to this fact than the officer who merely heard him say he saw the defendants. The petitioners suggest that the prosecutor and the police knew that Pilat's testimony would destroy the validity of the arrest. The conclusions in this regard are obvious. They knew that the Petitioners not being present could not disprove officer Hayes' claim of a conversation with Pilat. They also knew that if Pilat were not called by the Prosecutor that the defendant certainly would not call him, because they would be bound by his testimony without knowing what he would say. Furthermore, in the light of the Michigan rule requiring the consideration of the legality of the search to be restricted to the preliminary examination testimony, the testimony discrediting the search would not be able to subsequently reverse the decision of the preliminary magistrate.

In *Mapp v. Ohio*, 367 U.S. 643 (1961) this Court held that the states are bound by the Federal exclusionary rule. The Michigan procedural rule permits the effect of the *Mapp* decision to be circumvented by keeping out of the preliminary examination all testimony which would indicate that a search was illegal. This Court should take this opportunity to define the extent of the *Mapp* decision so that the states cannot use illegally seized evidence against defendants who cannot prove the illegal search on the basis of the preliminary examination proofs. The Michigan Rule as promulgated in the instant case, and the many cases preceding it, is in direct conflict with numerous United States Supreme Court decisions which require that the validity of an arrest and search must be tested in the light of all testimony relevant to that search regardless of when this testimony is brought out during the course of the proceedings.

2. The decision of the trial court that the search was legal was based upon the theory that the search was incident to a lawful arrest and therefore an exception to the requirements of the Fourth Amendment. The exceptions to the rule that a search may only take place pursuant to a validly issued search warrant have been jealously and carefully guarded; search incident to a lawful arrest is among them. See *Jones v. United States*, 357 U.S. 493 (1958). Where the defendants and the automobile which was searched have been in the continuous custody of the police, a search of the automobile without a warrant four hours after an arrest is not incident thereto, and is flagrantly unconstitutional. In *United States v. Scott*, 149 Fed. Supp. 837 (D.C. D.C. 1957) the Federal Court pointed out that the reason for this exception is to permit the officer to search the place which the accused has under his control. It is clear that the exception does not apply in the instant

case since the car was in the police pound for approximately four hours before it was searched and therefore was in the control of the police.

There is no reason why a search warrant could not be obtained if the officers at that time had probable cause therefor. In *Rent v. United States*, 209 Fed. 2d 893 (4th Cir. 1954) and *Papani v. United States*, 84 Fed. 2d 169 (5th Cir. 1936) it was pointed out that the right to search incident to the arrest is limited to searches contemporaneously conducted. In *People v. Kalpak*, 10 Ill. 2d 411, 140 N.E. 2d 736 (1957) where an arrest was made for a felony committed in the presence of the arresting officers, and therefore clearly valid, the return to the place of arrest one and one-half hours later to search for and seize the instruments used to commit the crime is not in any sense incidental to the arrest and is therefore illegal when conducted without a warrant. In light of these decisions it is clear that the search of the car in which the tires were found was not incidental to the arrest of the Petitioners and was therefore in violation of the Fourth Amendment to the United States Constitution. This Court should take this opportunity to define how far the exception to the Fourth Amendment can be extended without violation of the Constitutional principles upon which this amendment rests.

CONCLUSION

For the foregoing reasons it is respectfully submitted that the Petition for a writ of certiorari should be granted.

Respectfully submitted,

GOLDFARB and HUDNUT,
Attorneys for Petitioners,
2001 Cadillac Tower,
Detroit 26, Michigan.

Dated: Detroit 26, Michigan,
this 1st day of March, 1963.

APPENDIX A

C.L. 1948, §750.360 (Stat. Ann. 1954 Rev. §28.592), which reads:

> "Any person who shall commit the crime of larceny by stealing in any dwelling house, house trailer, office, store, gasoline service station, shop, warehouse, mill, factory, hotel, school, barn, granary, ship, boat, vessel, church, house of worship, locker room or any building used by the public shall be guilty of a felony."

APPENDIX B

People of the State of Michigan,
Plaintiff and Appellee,
v.
Edward John Williams and Evelyn Walker,
Defendants and Appellants.

No. 54.

Supreme Court of Michigan

Dec. 4, 1962.

Frank J. Kelley, Atty. Gen., Eugene Krasicky, Sol. Gen., Samuel H. Olsen, Pros. Atty., Samuel J. Torina, Chief Appellate Lawyer, Detroit, for the People.

Albert A. Goldfarb, Detroit, for defendants and appellants.

DETHMERS, JUSTICE.

Before the Entire Bench, except ADAMS, J.

Defendants were convicted of larceny in a building. The parties agree that the applicable statute is C.L. 1948, §750.360 (Stat. Ann. 1954 Rev. §28.592), which reads:

> "Any person who shall commit the crime of larceny by stealing in any dwelling house, house trailer, office, store, gasoline service station, shop, warehouse, mill, factory, hotel, school, barn, granary, ship, boat, vessel, church, house of worship, locker room or any building used by the public shall be guilty of a felony."

The structure in which the people allege the larceny occurred is described as being 7 feet, 7 inches high, 15 feet, 1 inch long, and 33 inches wide. According to the owner's testimony it is constructed of metal, attached to the land, bolted down to cement, entirely enclosed, a covered shed, it has overlapping doors with a steel bar coming down through the outside door and a padlock attached through the steel rod. In it tires were stored and displayed in 2 tiers, with a capacity for 100 tires. It had been constructed on the premises and located about 38 feet from the main gasoline service station building located on the same premises. On the night in question the doors had been closed and locked, but afterwards the mentioned rod on the door had been sawed apart, the lock removed, the door opened, and 5 tires taken.

[1] Is the structure in which the larceny was committed a building within the meaning of the quoted statute? Defendants say it is merely a tire rack. They suggest that it comes within the meaning of C.L. 1948, §750.114 (Stat. Ann. §28.309), making it a misdemeanor to break

and enter, with intent to commit the crime of larceny, "any outside show-case or other outside enclosed counter used for the display of goods * * *". We think the structure here involved is considerably more than a show case or counter in the ordinarily accepted sense of the terms.

Defendants cite Rouse v. Catskill & N. Y. Steamboat Co., 59 Hun 80, 13 N.Y.S. 126, in which it was held that a vessel is not a building within the meaning of an ordinance prohibiting the sale of liquor in a building; Town of Union v. Ziller, 151 Miss. 467, 118 So. 293, 60 A.L.R. 1155, in which a metal billboard was held not to be a building under an ordinance prohibiting metal buildings; Trueschell v. Gay, 13 Gray 311, 79 Mass. 311, in which a wall around 3 sides of the stack of an iron furnace to protect the stack from earth sliding down a hill behind it is not a building within the lien law, to permit a lien to attach to it; Whiteley v. Mayor and City Council of Baltimore, 113 Md. 541, 77 A. 882, in which it was held that, in a street opening proceeding in which it was required that a map be filed showing lots and buildings to be taken, it was not necessary to show a portable schoolhouse thereon because it was intended to be there only temporarily and was not a building to be taken or destroyed for the street opening; Bailey v. Ohio, 26 Ohio Cir. Ct. 375, in which a chicken coop 37¾ inches by 38 inches by 2 feet high, which was moved from place to place and not attached to the ground, was not a building within the meaning of a statute defining burglary as breaking and entering any building, because lacking any permanency of location as a structure. These are of scant assistance to defendants here with respect to the structure of the size, permanent character and type of construction and attachment to the realty here involved.

In Truesdell the following was said:

> "The word 'building' cannot be held to include every species of erection on land, such as fences, gates or other like structures. Taken in its broadest sense, it can mean only an erection intended for use and occupation as a habitation or for some purpose of trade, manufacture, ornament or use, constituting a fabric or edifice, such as a house, a store, a church, a shed."

This structure comes well within this definition of a building.

In Sanchez v. People, 142 Colo. 58, 349 P.2d 561, 78 A.L.R.2d 775, we find in the syllabi (P.2d) the following:

> "1. All stationary structures within State, no matter of what substance they may be constructed, are within term 'building' as used in burglary statute, so long as they are designed for use in position in which they are fixed.
>
> "2. Although a telephone booth may be only a closet by dictionary definition when within another structure, it is a 'building' within purview of burglary statute when set apart. * * *
>
> "4. Under statute defining burglary as entry with felonious intent into any building, defendant who was prying cover off coin box in outside telephone booth was guilty of 'burglary'."

By the same token, whatever term might be applicable to the structure here involved if it were inside another building, set apart and outside, as it was, it was a building within the meaning of the applicable statute.

[2] Was evidence taken by officers from defendants' car (5 automobile tires) unlawfully seized and, therefore, should it have been suppressed as such upon defendants'

motion to suppress filed and heard by the court in advance of trial?

At the preliminary examination the arresting officer testified, in substance, that at about 3:30 a. m., while assigned to scout a certain area, he received radio instructions to go to a specific location because of a report of the presence there of a suspicious looking man; that the officer went as directed and saw a citizen on the sidewalk who told him that he had seen a suspicious man rolling a new, packaged or wrapped tire on the street toward an automobile still parked nearby and that the man had placed the tire either in the trunk or under the rear end of the car; that he, the officer, thought this might mean that the tire had been stolen because at that hour of the night no tire sales place was open in that neighborhood in which a new tire might be purchased; that, in consequence, he shined a flashlight into the car and found the two defendants hiding in the front of the car, lying in a prone position; that he thought the tire might be in the car; that he then asked for the key to the trunk, but defendants said they had not had one for years; that the officer asked the male defendant what he had done with the tire he had been rolling down the street and that he denied having it; that he then arrested defendants and searched them; that in the male defendant's pocket he found a pair of pliers, a paring knife, tan gloves, and a hacksaw; that after taking defendants and the car a report came about the 5 tires having been stolen from the structure above described; that thereafter the officers gained access to the trunk through the rear seat and found 5 new tires identified by the owner as those taken from said structure, the tires having marked thereon the name and location of another gasoline station in which he was a partner.

We think the above was sufficient to give rise to probable cause for the officers to believe that a crime had been committed by defendants and warranted the arrest and search of defendants and subsequent search of the car. A reasonable mind could hardly have concluded otherwise on the basis of such knowledge and information.

[3] Defendants seek to inject into the consideration of this problem testimony later taken on trial, which they urge as refuting the officers' testimony at the examination bearing on that question of probable cause and validity of the search and seizure and, hence, admissibility of the tires into evidence. This is not permissible. In People v. Taylor, 341 Mich. 570, 67 N.W. 2d 698, and cases cited therein, we have held that the illegality of seizure of evidence, where such illegality is known before trial, must first be raised by a timely motion to suppress the evidence made before trial. Here the facts relating to the alleged illegality of the search and seizure were as well known to defendants at the time made as at time of trial. Timely motion in advance of trial was, therefore, required. It was so made, but denied before trial on the basis of the testimony adduced at the examination. In People v. Zeigler, 358 Mich. 355, 100 N.W.2d 456, we said:

> "What about probable cause in the case at bar? The only showing before the circuit court on the motion to suppress consisted of the testimony presented at the preliminary examination. Amplifying testimony later taken at trial cannot be considered. We are limited to that taken at the examination. People v. Miller, supra [245 Mich. 115, 222 N.W. 151]."

In People v. Miller, 245 Mich. 115, 222 N.W. 151, the following appears:

> "Determination of motions to dismiss a criminal charge against accused and to suppress the evidence obtained by a search of accused's automobile rests upon the showing at the preliminary examination, and therefore testimony later taken on the trial, amplifying the circumstances of the search, may not be considered by the Supreme Court in reviewing denial of the motions." Syllabus 1.

In People v. Willis, 243 Mich. 164, 219 N.W. 609, the second syllabus contains the following:

> "Where the matter of the search and its legality was gone into before the trial, upon motion to suppress the evidence obtained thereby, and the motion was denied, the matter should not again be gone into on the trial, but the prosecution had a right to offer the liquor in evidence, and the jury were in no way concerned with the manner in which it had been secured, and the same rule applies in trial before the court without a jury."

To the same effect are People v. Kerwin, 234 Mich. 686, 209 N.W. 157, and People v. Kramer, 260 Mich. 94, 244 N.W. 243.

The trial court did not err in denying motions to suppress evidence.

[4] Finally, defendants say the finding of guilt by the trial judge is contrary to the great weight of the evidence. That voices, of course, a civil case test. The question, properly stated (People v. Moore, 306 Mich. 29, 10 N.W. 2d 296), is whether the evidence was ample to warrant a finding of guilty beyond a reasonable doubt of the crime charged. In Gablick v. People, 40 Mich. 292, this Court said:

> "Possession of stolen property, if immediately subsequent to the larceny, may sometimes be almost conclusive of guilt (see Walker v. People, 38 Mich.

156); but the presumption weakens with the time that has elapsed, and may scarcely arise at all if others besides the accused have had equal access with himself to the place where it is discovered."

Here defendants had possession shortly after the offense must have been committed, minutes after a man was seen rolling a new, wrapped tire to the car. It does not appear that anyone other than defendants had had access to the car before the officers took it into possession nor thereafter until they gained access, through taking apart the back seat, into the trunk and found the 5 tires, identified by the owner as stolen from his place of business. The fact that defendants were hiding in the car, that they denied having had a key to the trunk though the 5 freshly stolen tires were soon thereafter found therein, that one defendant had a hacksaw in his pocket and that the bracket to which the padlock was attached had been sawed apart, testimony as to all of this adds up, it seems to us, to enough to support a finding of guilt beyond a reasonable doubt.

Affirmed.

CARR, C. J., and KELLY, SOURIS, SMITH and ADAMS, JJ., concurred with DETHMERS, J.

BLACK and KAVANAGH, JJ., concurred in result.